No. 8797

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed .....

Clerk .....

No. 8797

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION.

This is an appeal from a decree, rendered in a suit in equity brought by the plaintiff, Agnes McIntire, against the defendants, United States of America, Harold Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of the Flathead Reclamation Project, Alex Pablo and A. M. Sterling (the two defendants last named are appellees in this court), Flathead Irrigation District, a corporation, and certain defendants designated as nineteen members of the Flathead Tribe of Indians. The suit was brought for the dual purpose, according to the prayer of the complaint, of (1) partitioning the waters of Mud Creek and quieting plaintiff's title to 160 inches of said water as partitioned, and (2) restraining the defendants from interfering with plaintiff's water right as partitioned and quieted. (R. 81)

An original and one amended complaint was filed prior to the time that the Flathead Irrigation District was made a party. (R. 2 and 60). On May 1, 1936, the amended complaint which made the Flathead Irrigation District a party defendant and which framed the issues upon which the case was tried, was filed, evidently for the purpose of complying with the decision of this court in the case of Moody v. Johnston, 66

Fed. (2d) 999, to the effect that all interested parties must be joined in such a suit. (R. 73)

This complaint alleges the execution and ratification of the Flathead Treaty of July 16, 1855 (12 Stat. L. p. 975), which was proclaimed April 18, 1895, creating the Flathead Reservation; that the Indians were encouraged to abandon their nomadic ways and become civilized people on lands afterward allotted; that the land on the reservation is arid and requires one inch of water per acre for proper irrigation; that the Indians settled on the reservation and are farming the same by use of artificial irrigation. (Comp. Par. I, R. p. 74-75).

That Michel Pablo and Lizette Barnaby, both members of the Flathead tribe, "made allotment" for certain described lands. (Comp. Par. II, R. 75)

That on April 15, 1900, Michel Pablo, by means of a ditch with a capacity of 160 inches, carried water from Mud Creek to the allotments described in Paragraph II of the complaint, and thereby appropriated the 160 inches of water which became appurtenant to the lands. (Comp. Par. III, R. 75-76).

That on January 25, 1918, a fee patent issued to Agatha Pablo, wife of Michel Pablo, covering the Michel Pablo allotment, and that on October 5, 1918, a a fee patent issued to Agatha Pablo covering the Barnaby allotment and that plaintiff subsequently became the owner in fee of the lands and the 160 inches of water appurtenant. (Comp. Par. IV, R. 76).

That Congress passed the Act of June 21, 1906 (34 Stat. L. p. 354) amending the Act of April 23, 1904

(33 Stat. L. p. 302), providing for the allotment of Indian lands and the opening of the same for sale. That from April 15, 1900, to the present date the water from Mud Creek has been used on the lands and that plaintiff claims 160 inches thereof. (Comp. Par. V. R. p. 76)

That no parties other than plaintiff and defendant, United States, are using water; that said parties are joint tenants and that the water can be partitioned. (Comp. Par. VI, R. 77-78)

That defendant Ickes, Secretary of the Interior, claims to be in charge of the Flathead Irrigation Project and that defendant Gerharz claims to be project manager. (Comp. Par. VIII, R. 79).

That defendants are claiming that plaintiff has no right to the waters of Mud Creek and are preventing water from flowing in plaintiff's ditch to plaintiff's damage. (Comp. Par. IX, R. 79)

That the value of the water exceeds the sum of $3,000.00; that this action is necessary to prevent a multiplicity of suits; that plaintiff has no plain, speedy and adequate remedy at law. (Comp. Pars. X, XI XII, R. 79)

That the defendant, Flathead Irrigation District, is a corporation and that all of the defendants make some claim to the waters. (Comp. Pars. XIII, XIV, and XV, R. 79-80).

The prayer asks that the United States be required to set up its interest; that the right of plaintiff be partitioned; that plaintiff be given a prior right of 160

inches and that the defendants be restrained from interfering with plaintiff's water.

The answers filed by the defendants Alex Pablo and A. M. Sterling contain cross-complaints based on substantially the same facts as set forth in the amended complaint and claim an appropriation for both Alex Pablo and A. M. Sterling as successors to portions of the Michel Pablo appropriation. (R. p. 138)

The defendant, Flathead Irrigation District, filed an answer which put in issue the rights of the plaintiff to appropriate water on an Indian Reservation (R. 121), and the plaintiff's ownership of any interest in the water of Mud Creek (R. 122) and which set up the incorporation of defendant district (R. 123), the contracts of the defendant district with the United States (R. 124), and claim of defendant that there is not and never has been a right to take water upon the Flathead Reservation other than through the Flathead Irrigation Project. (R. 125-127).

By stipulation all new matter contained in the answers of all parties was deemed denied without need of a written reply. (R. 335).

The jurisdiction of the district court in this suit is based upon the provisions of the Judicial Code, paragraph 25 (30 Stat. L. 416, 30 Stat. L. 1094, 28 U. S. C. A., section 41, par. 25),providing for partition of lands held in joint tenancy by the United States.

STATEMENT OF THE CASE

As is seen from the plaintiff's complaint herein, the

plaintiff claims by virtue of an appropriation thereof a right to the waters of Mud Creek prior to that of the United States and the remaining defendants. The defendants, Sterling and Pablo likewise claim rights to the waters of Mud Creek by virtue of private appropriations. (Answer of Pablo and Sterling, Tr. 138). The only question which this appellant seeks to review is whether the plaintiff and the defendants Pablo and Sterling are entitled to water from Mud Creek aside from their rights under the Flathead Irrigation Project and if so the nature of those rights.

A. Creation and Purpose of Defendant. Flathead Irrigation District.

The appellant, Flathead Irrigation District, is a public corporation organized under the laws of Montana (Sections 7166 to 7194.8 R.C.M. 1935) for the purpose of cooperating with the United States in the construction of irrigation works and projects and pursuant to the Acts of Congress of May 10, 1926 (44 Stat. 464-466), January 12, 1927 (44 Stat. 945), March 7, 1928 (45 Stat. 212-213), March 4, 1929 (45 Stat. 1574), March 4, 1929 (45 Stat. 1639-1640), and May 14, 1930 (46 Stat. 291) (Tr. p. 270, Def's. Ex. 16) The Flathead Irrigation District, after its creation, entered into contracts with the United States (T. 269-270-328), whereby the said district will upon repayment to the United States become the owner of the Flathead Irrigation Project. Since the appellant irrigation district is under contract to pay for the project, it is vitally interested in the rights of the United States as the present own-

er of the project to the waters of Mud Creek.

B. Creation of Reservation.

The Flathead Indian Reservation was created by the Flathead Treaty executed July 16, 1855 and proclaimed April 18, 1859 (12 Stat. 975) Under the treaty the Flathead Nation ceded to the United States a large tract of land and there was reserved for the "exclusive use and benefit of said tribes as an Indian Reservation" a smaller tract. Section VI of the treaty provided:

> "The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

C. Origin of Rights Claimed by Plaintiff and Defendants Pablo and Sterling.

The record shows that by the year 1891 Michel Pablo, a Flathead Indian was living on what was known as the "Pablo Place" and had dug a ditch taking water from Mud Creek for the land. (R. p. 242) From this ditch the tracts later alloted to Alex Pablo, Agatha Pablo and Michel Pablo and Joe Pablo were irrigated. (R. P. 241) The ditch was so dug that the water could be used on what was later the Barnaby allotment. (R. p. 240). A notice of appropriation dated Nov. 12, 1937,

(apparently an error) claiming 560 inches of water as of April 15, 1900, was admitted over objection. (R. p. 319 Defs. Ex 19).

At the time of the claimed appropriation the reservation had not been opened to settlement and no allotments in severalty had been made. In 1904, Congress by its act of April 23rd, 1904 (24 Stat. L. 302) provided for the survey of the reservation, the allotment of lands in severalty and the sale of surplus unalloted lands. It was stipulated at the trial that no trust patents issued for lands in the Flathead Reservation prior to October 8, 1908 (R. p. 333).

The plaintiff claims as the successor of Agatha Pablo who on January 25, 1918 received a fee patent for the land which had been alloted to Michel Pablo (R. p. 232, Pfs. Ex. 1) and who on October 5th, 1916 received a fee patent for land which had been alloted to Lizette Barnaby (R. p. 234, Pfs. Ex. 2). Plaintiff secured title to these lands on September 25th, 1924 by virtue of a sheriff's deed which issued after the foreclosure of a mortgage. (R. p. 235, Pfs. Ex. 3) The record does not show the chain of title to the lands of Sterling and Alex Pablo except that Alex Pablo testified that he was a ward of the government and owned an allotment (R. pp 315) and it was stipulated that A. M. Sterling is the owner of the South half of the Northeast quarter of Section fourteen, Township twenty-one North, Range twenty West. (This stipulation is apparently incorrect because Sterling in his answer claims the Northwest not the Northeast quarter. This

appellant does not however make any point of this error.) All of the appellees are thus claiming through the appropriation alleged to have been made by Michel Pablo.

D. History of Flathead Irrigation Project.

The Act of Congress, April 23, 1904 (33 Stat. L. 302) which provided for the allotment of lands in severalty to the Flathead Indians, and provided for the sale of surplus unalloted lands, provided in Section 14, for the use of the proceeds of the sale of surplus unallotted lands, in part, as follows:

> "One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, *in the construction of irrigation ditches, the purchase of stock, cattle,* farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect." (Italics supplied)

The report of the Commissioner of Indians Affairs for the year 1907 shows:

> "On April 26, 1907, the Director of the Reclamation Service was asked to make a preliminary investigation on the Flathead Reservation in Montana to enable me to recommend the legislation needed for an adequate system of irrigation for

> the Indians to be allotted and for the lands to be disposed of under act of April 23, 1904. (33 Stat. L. 302) No report has yet been received from him."

(Annual Reports of Department of Interior—Administrative 1907 Volume 2, p. 52). We ask the court to take judicial notice of this report as a public document. The Bureau of Reclamation for the purpose of providing waters for the Indian lands to be allotted and the surplus unalloted lands made a survey in the Flathead area in 1907 and 1908 as shown by the report of the Bureau of Reclamation for that year. (7th Annual Report Reclamation Service p. 100-101, Defendant Flathead Irrigation Dist. Ex. 31, R. 334). The funds for this work were provided by Act April 30, 1908 (35 Stat. L. p. 83) which is as follows:

> "For preliminary surveys, plans and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April twenty-third, nineteen hundred and four, entitled 'An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment,' and to begin the construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation."

Engineer Stockton testified that as a representative of the Reclamation Service he went to the Flathead Reservation in 1907 and made a survey for the purpose of determining the best possible distribution to be made of the natural resources of the reservation (Record p.

253 and Defendants Ex. 8 R. 254). Stockton laid out a system of irrigation and estimated the irrigable acreage (R. p. 255). At that time it was planned to use the waters of Mud Creek, the idea being to take up all the water available and provide as much storage as possible to get the greatest possible useful development of the lands on the reservation. (R. 256) Later the Pablo feeder canal was designed and constructed to conserve the waters of Mud Creek and other small streams. (R. p. 256 and 258).

The Act of Congress of May 29, 1908 (35 Stat. L. 488), amending Section 9 of the Act of April 23, 1904 (33 Stat. L. 302) provided generally for the sale of unallotted lands and the price thereof and also provided for the manner in which purchasers should pay for water rights; the act then provided in Section 9, relative to Indian allotees, as follows:

> "The lands irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. *All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.*" *(Italics supplied.)*

and further provided in Section 14 for the disposal of the proceeds of the sale of surplus lands as follows:

"That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians and persons holding tribal rights on said reservation, semi-annually as the same shall become available, share and share alike: Provided, *That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system.*" *(Italics supplied)*

Thereafter and from year to year various measures were passed appropriating money for the construction of the project and the cost to June 30, 1936, was $7,499,105.85 (R. p. 265).

The waters of Mud Creek affect approximately 80,000 acres in the Mission Valley Division, which includes the greater portion of the Flathead Irrigation District. (R. 262, 265-266) These waters are used upon lands which had no water prior to the construction of the

system (R. 330) and even with the waters of Mud Creek there is a shortage of water for the lands under the project. (R. p. 259, 329, 332).

E. The Recognition by the United States of Private Rights

The record shows certain acts of the Secretary of the Interior recognizing private water rights on the reservation. (R. 271 to 293, and 295 to 296, also R. 296 to 310.) This appellant raises no question with respect to these rights and any extended discussion of them would simply reiterate matters contained in the brief of the United States and other appealing defendant. The defendants claim apart from the rights adjudicated by the Secretary of the Interior and it is with the rights claimed in excess of those granted by the department that this appellant is concerned.

F. Duty of Water and Abandonment.

There is considerable evidence in the record with respect to the duty of water and the bandonment of the rights of plaintiff and defendants Sterling and Pablo. However, since these matters are urged by the United States and since this appellant is concerned only with the broader question of law involved we assign no error in this court with respect to the findings of the court on duty of water and abandonment and will refrain from setting forth the facts relative thereto.

G. Rights of the Plaintiff and Defendants Within the Irrigation System.

The record shows that the lands of appellees are classified as irrigable and lie within the Flathead Irriga-

tion District and have been assessed with operation and maintenance charged by the United States (R. 294, 295). However, no demand has been made by plaintiff for water from the system (R. 264) though plantiff's lands could be supplied within a short time (R. 262, 263).

The questions raised by this appeal are

1. Whether the plaintiff or the defendants Pablo and Sterling have any private rights on the Flathead Reservation *prior to the rights of the United States,* and other than those decreed by the Secretary of the Interior, and
2. Whether the plaintiff and the defendants Pablo and Sterling have any rights to take water from Mud Creek (other than those adjudicated by the Secretary of the Interior) except through the Flathead Irrigation Project.

SPECIFICATIONS OF ERROR

The assigned errors which are to be relied upon are:

ARGUMENT

SUMMARY OF ARGUMENT.

(Note: When in this arguement appellant refers to

private rights, it refers only to those which are claimed apart from the adjudication of the Secretary of the Interior).

I. That it has never been possible to create water rights, with a date of priority, on the Flathead Indian Reservation, under the doctrine of prior appropriation for:

A. The Flathead Treaty reserved the lands and waters of the reservation for the Indians.

1. The reservation of lands and waters was for the Indians as a tribe, not as individuals.

B. The United States thereupon became the trustee of said lands and waters for the benefit of the Indians as a tribe.

C. There has never been a law under which water rights could be created on the Flathead Reservation by appropriation.

1. The State Law of appropriation did not apply.
2. There is no law of the United States creating such rights, Section 19 of the Act of June 21, 1906 (34 Stat. L. 354) being a mere saving clause and inoperative to create rights.
3. The idea of prior appropriation is repugnant to any theory of equitable treatment of the Indians on a reservation.

II. There is no right in plaintiff or appellee defendants to take any water from the streams on the reservation except as such parties would be entitled to water from the Flathead Irrigation Project. (We contend that the doctrine of U. S. vs. Powers

et al (16 Fed. Supp. 155, affirmed 94 Fed. (2) 783) cannot be applied to the Flathead Reservation.)

A. The record here shows that the appellees could get water from the project system.

B. The United States, which sustained to the Indians the guardian and ward relationship, had plenary power to provide for the distribution of the waters of the reservation so as to provide the greatest good for the greatest number, and the method designated by the United States is the exclusive method.

C. The United States has indicated that rights to water be obtained only through the project system.

D. This did not disturb any vested rights because the lands were made subject to the system before any private rights attached to the lands.

E. The system provided is the most equitable which could be devised.

I. IT HAS NEVER BEEN POSSIBLE TO CREATE WATER RIGHTS WITH A DATE OF PRIORITY UPON THE FLATHEAD INDIAN RESERVATION, UNDER THE DOCTRINE OF PRIOR APPROPRIATION.

Assignment Error No. II (R. p. 358)—The court erred in entering judgment against the defendant, Flathead Irrigation District.

Assignment Error No. IV (R. p. 358)—The Court erred in holding that the waters of Mud Creek are now, or ever have been, subject to private appropriation

by the plaintiff, Agnes McIntire, or by the defendants, Alex Pablo and A. M. Sterling.

Assignment of Error No. V (R. p. 359)—The Court erred in holding that the rights of the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, to the use of the waters of Mud Creek are prior to the rights of the United States and the defendant, Flathead Irrigation District.

Assignment of Error No. VII (R. p. 359)—The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to the lands now owned by plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, by reason of an appropriation of said waters by the predecessors in interest of the plaintiffs and of said defendants.

Assignment of Error No. IV (R. p. 360)—The court erred in holding that the maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

If it be established that there can be no rights created on the Flathead Reservation by prior appropriation, then it is clear that the court erred in entering judgment against the Flathead Irrigation District, (R. 225) in holding that the waters of Mud Creek were sub-

ject to appropriation by plaintiff and defendants Pablo and Sterling (R. 175, 210, 216, 218) in holding the rights of respondents to be prior to the rights of the United States (R. 171), in holding the waters of Mud Creek to be appurtenant to the lands of respondents (R. 210, 216, 218), and in holding that the maintenance of a dam by the United States is unlawful. (R. 225).

A. THE FLATHEAD TREATY RESERVED THE LANDS AND WATERS OF THE RESERVATION FOR THE BENEFIT OF THE INDIANS.

By Section 1 of the treaty of July 18, 1855 (12 Stat. p. 975, 2 Kappler 542), the Flathead nation ceded to the United States a large section of territory, and by Section 2 of the treaty reserved for the use and occupation of the Indians a smaller area, for the "exclusive use and benefit of said confederated tribes as an Indian Reservation." It is clear from all the authority on this subject that the waters as well as the lands were impliedly reserved for the benefit of the Indians.

Winter v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340.

It is not questioned but that the waters were reserved for the Indians, but there is confusion as to the meaning of the term "Indians." Does the word refer to the tribe or does it refer to the individual members of the tribe?

1. THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS.

In U. S. v. Powers et al (16 F. Supp. 155), the Dis-

trict Court held that under the Crow Treaty the reservation was for the benefit of the Indians as individuals. Whether the proposition was there correctly decided is not necessary to a decision here for it is clear that under the Flathead Treaty a different result must obtain.

The Flathead people were not living upon the present reservation at the time of this treaty. They were living in the general area of the Bitter Root Valley in Montana. This is shown by the terms of the treaty itself. In Article 2 of the treaty the Indians agree to move to the reservation within one year after the ratification of the treaty. The treaty further provided for the appraisal of the improvements of the Indians who, on moving, had to abandon the same. It also contains a provision for the payment of certain money to compensate the Indians for moving to the reserved land. The treaty of 1855 did not definitely fix the reservation at least so far as the Flatheads were concerned. Article II of the treaty provided that if upon a survey it should be decided that the Bitterroot Valley was better suited to the needs of the tribe than the general reservation then portions of the Bitterroot should be set aside as a reservation. The question was not settled until the proclamation of President Grant in 1871.

Northern Pac. R. Co. v. Maclay, 61 Fed. 554.

Northern Pac. R. Co. v. Hinchman, 53 Fed. 523.

It is indeed difficult to see how the Indians who were not living on the lands now in question could have had any rights in severalty to either the lands or waters.

At the time of the Treaty the lands here involved were not even occupied by the Flatheads. Even if we assume that the waters were appurtenant to the lands no right to water could vest in an individual prior to the time that the individual secured some rights in the land.

Article 6 of the treaty, the provisions of which are as follows:

> "The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

clearly shows that the reservation was for the tribe. Any ownership in severalty was expressly deferred subject to the discretion of the President. Not until after a survey and allotment could an individual right accrue. The survey and allotment was not provided for until the Act of April 23, 1904 (33 Stat. L. 302.) It is clear therefore from the provisions of the treaty that at the time of the treaty the waters were reserved for the tribe. Apart from ownership in lands in severalty there could be no right to water in severalty and since the treaty created a common ownership of the land there was necessarily created a common ownership of the water. At this point we call the court's attention to Article 6 of the Treaty with the Omahas (10 Stat. L.

1043, 2 Kappler 453), referred to in Article 6 of the Flathead Treaty. Article 6 of the Omaha Treaty does not change the situation so far as the question of severalty or common ownership is concerned.

B. THE UNITED STATES BECAME TRUSTEE OF THE LANDS AND WATERS FOR THE BENEFIT OF THE INDIANS AS A TRIBE.

Since the case of Johnson v. McIntosh (8 Wheat. 543, 5 U. S. (L. Ed.) 681), it has been unifromly held that the fee title to all of the lands in the Louisiana Purchase is in the United States, subject only to the right of occupancy in the Indians. (25 R. C. L. 123) However, upon the ratification of the Flathead Treaty, the United States became a trustee for the Indians of the lands and waters in the reserevd area. Whatever may have been the obligation of the United States with respect to the title held for the Indians, it is clear that the title to the land and water was in the United States. In saying this we do not disagree with the language in the case of U. S. v. Powers et al, (94 Fed. (2) 783, at page 785,) where the court said:

> "There was in the treaty no express reservation of water for irrigation or other purposes. There was, however, an implied reservation. Winters v. United States, 207 U. S. 564, 575, 28 S. Ct. 207, 52 L. Ed. 340. The implied reservation was to the Indians, not to appellant. Skeem v. United States, 9 Cir. 273 Fed. 93, 95; Conrad Investment Co. v. United States, 9 Cir., 161 F. 829, 831; Winters v. United States, 9 Cir., 143 F. 740, 745, affirmed in 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340."

But we do insist that the reservation to the Indians

vested in the United States as trustee for the Indians. We do not contend that the United States, as a sovereign, held unto itself this title, but we do claim that the United States as guardian of the Indians, held this title after the execution of the treaty.

In the case of Minnesota v. Hitchcock, (185 U. S. 373, 46 L. Ed. 954, 22 S. C. 650) the Supreme Court considered the question of the title of the United States to lands in an Indian Reservation, and said:

> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.
>
> But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone up the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility."

In the case of Cherokee Nation v. Hitchcock, (187 U. S. 294, 47 L. Ed. 183, 23 S. C. 115) it was held that the United States as guardian of the property of the Cherokee Nation might make leases of the unallotted lands of the Cherokees for oil and gas. The court said:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.
>
> The holding that Congress had power to provide

a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. The Cherokee Trust Funds, 117 U. S. 288, 308. The manner in which this land is held is described in Cherokee Nation v. Journeycake, 155 U. S. 196, 207, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.'

There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States v. Richert, (188 U. S. 432, 47 L. Ed. 532, 23 S. C. 478) the Supreme Court, held that the State of South Dakota had no power to tax lands to which trust patents had issued, and in so holding said:

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have

> not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficient objects with reference to a race of which this court has said that 'from their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' "

We cite this case for the limited purpose of showing that the United States hold as trustee for the Indians.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. Ed. 299, 23 S. C. 216) the Supreme Court held that the United States had power to sell surplus lands contrary to the provisions of a treaty.

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . .
>
> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in Cherokee Nation v. United States, 119 U. S. 1, 27, and Stephens v. Cherokee Nation, 174 U. S. 445, 483."

The entire history of Indian litigation and legislation assumes the title to be in the United States. The very manner in which the trust and fee patents are issued precludes any other theory. And it must follow, as the night the day, that if the Government held the title to the reserved land it likewise held title to the reserved waters.

We stress this seemingly obvious point because upon a proper consideration of it depends the entire question of Indian reservation waters.

C. THERE HAS NEVER BEEN A LAW BY WHICH A WATER RIGHT COULD BE CREATED BY APPROPRIATION ON THE FLATHEAD RESERVATION.

Since the title to the waters remained in the United States, a right to water could necessarily be secured only from the United States under some law authorizing such a right. There has never been enacted such a law.

1. The state laws do not apply.

The case of Winters v. U. S. (207 U. S. 564, 52 L. Ed. 340, 28 S. C. 207) is authority for the proposition that the United States had the power to reserve the waters from private appropriation. And that decision determines that waters needed for the reservation cannot be appropriated for use outside the reservation.

A right in persons within the reservation to appropriate water under State Law was never recognized by Congress. The enabling act of the State of Montana expressly provides:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States."

Act of Congress, Feb. 22, 1889 (25 Stat. 676, Vol. 1 R. C. M. 1935, p. 60)

The Act of Congress of July 26, 1866, C 262, Sec. 9 (14 Stat. 243, 43 U.S.C.A. 661) which recognized the doctrine of prior appropriation, where the same existed by local custom applied only to the *public* lands and waters of the United States.

Winters v. U. S., 143 Fed. 740, at page 747;

Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761;

Smith v. Deniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408;

Cruse v. McCauley (C C) 96 Fed. 369.

Lands reserved for an Indian Reservation were not public lands.

In Northern Pac. R. Co. v. Maclay, (61 Fed. 554,) it was held that the lands in the Bitterroot Valley mentioned in Section 11 of the Flathead Treaty of 1855 were not public land. The court said:

> "From the agreed statement of facts, it affirmatively appears that the lands in question, in the

> Bitter Root valley, above the Lolo Fork, in the state of Montana, were not public lands of the United States at the date of the passage of the 'Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Pugent Sound on the Pacific coast by the northern route, approved July 2, 1854.' "

The United States Supreme Court held that lands reserved to the use and benefit of the Indians were not public lands in the case of Leavenworth, etc. R. R. Co. v. U. S., (92 U. S. 733, 23 L. Ed. 634,) saying:

> "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it. It may be urged that it was not necessary in deciding that case to pass upon the question; but, however, this may be, the principle asserted is sound and reasonable, and w eaccept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. State v. Delesdenier, 7 Tex. 76; Spaulding v. Martin, 11 Wis. 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the government."

Our point here is simply this: In order that the state laws apply to water on an Indian Reservation, it is necessary that there be some authority from the United States recognizing the applicability of such laws and as we have seen there is no such Federal law.

This was settled in U. S. v. Rio Grande Irrigation

Company, (174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136) where the court said:

> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belong to each state, yet two limitations must be recognized: First. That, in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property. Second. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

2. There is no law of the United States under which rights could be created by private appropriation.

The Federal Government did not authorize the creation of rights under state law nor did the federal government ever by its own enactment create or recognize the doctrine of appropriation independently of state law.

Section 19 of the Act of Congress of June 21, 1906 (34 Stat. 354) has been consistently relied upon as authority for the appropriation of the waters of the Flathead. The respondents all reply upon it. (R. 77 and 146) And Judge Pray relied upon it in rendering his decision in this cause (R. 160) The Act in question reads:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or

> corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

It is apparent that Section 19 is a saving clause and nothing more.

See Shutt v. State, (173 Ind. 689 at 692, 89 N. E. 6,) where it is said:

> "There is no particular rule for its location, or its verbal form; but it is generally near or at the end, commencing, 'Nothing in this act shall,' "

Its purpose was to save such rights as existed and not to create any rights. The clause operates only in restrospect and did not purport to create or provide a method for creating rights in future.

As a saving clause it could not operate to create rights. The rule with respect to a saving clause is well stated in Knickerbocker Ice. Co. v. Stewart, (253 U. S. 149 at page 162, 64 L. Ed. 834, 40 S. C. 438) in these words:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlick, Interpretation of Statutes, Sec. 372."

See also 59 C. J. 1093, as follows:

> "A saving clause is an exception of special things out of the general things mentioned in the statute; something smaller than the thing itself, and yet not nullifying it. Its usual function is

not to create anything, but to preserve something from immediate interference***"

A reference to the proceedings in Congress with respect to Section 19 discloses that it was not the intent of Congress to create a right to appropriate water. After the bill H. R. 15331 of the 59th Congress, First Session, had passed the House, the sections relating to townsites were added to the Act by amendment on the floor of the Senate (Cong. Rec. Vol. 40, p. 6036). The matter was the subject of some debate which discloses no evidence of any intent to create any water right or to extend the laws of the State relating to appropriation to Flathead lands.

At the time of the enactment of Section 19, neither the Winters case nor the Conrad case had been decided. It would be quite natural for Congress to insert a saving clause that would say no more than that the legislation was not intended to alter or change the rights of parties who were using water from the streams on Indian Reservations. That is the usual purpose of a saving clause, as pointed out in the Knickerbocker case heretofore cited.

As a matter of fact, reference to the Congressional Record will show that during the debate on the Act in which this section is included there was some discussion of the Conrad case and one amendment offered was designed to compel a dismissal of that action. Reference may be had to that debate and to the amendment which was not adopted (and which would also have made Montana appropriation laws apply to the Black-

feet Reservation) by an examination of Volume 40, Congressional Record, pp. 5811-5813.

Reference to that proposed amendment, never adopted, shows clearly that it was understood by the members of Congress, first, that without special enactment Montana laws relating to appropriation would not apply and, second, that the final outcome of the Winters and Conrad cases was unknown, which would explain the insertion of a saving clause in the pending legislation.

Since Section 19 was a saving clause, the question then arises, what, if anything, did it save? The answer is nothing. Since at the time of the enactment of Section 19, which was in 1906, there were no rights in severalty either in trust or fee on the reservation, how could it be said that any person could have appropriated water for his land? How could water have become appurtenant to private land when there was as yet no private ownership of land? Until after the trust patents issued which was not prior to October 8, 1908, no Indian had a vested right to any particular land, the whole being in the United States for the benefit of all. We therefore urge that Section 19 did not and could not save any prior rights because there were none to save.

Even if there had been private rights to land at the time of the passage of Section 19, the result would be no different for the reason there was no law prior to that time, as we have pointed out, under which rights to water by prior appropriation could be initiated. In the absence of the consent of the United States no

individual could obtain a right hostile to its ownership of the waters, as trustee of the entire tribe. In order to find that Section 19 saved any rights, it is first necessary to find the rights, and in order to find such rights it is necessary to hold that Indians who had no private ownership of lands were able, without the consent of the United States to divest the United States of its title as trustee, to water, and then in some way affix that divested title as a private appurtenance to land still owned by the United States as trustee.

The Acts of Congress which governed the lands on reservations prior to the Act of June 21, 1906, not only did not recognize prior appropriation as the law of the reservation, but indicated that prior appropriation was not to be the rule.

The General Allotment Act of 1887 (24 Stat. L. 388) provided in Section 7:

> "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

It is clear from this act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality the Secretary was authorized to make rules and regulations. Wheth-

er such rules and regulations were provided is not important here for we are concerned only with the intent of Congress to make equality the rule. The act then goes on to say that *no other appropriation or grant of water by a riparian appropriater shall be authorized or permitted to the damage of any other riparian proprietor.* The words *"no other appropriation"* must refer back to *"just and equal distribution"* and consequently any appropriation which gave an Indian a greater quantity of water or an earlier priority than others was clearly unlawful. It is true that the statute uses the word "riparian," but since all the land was in one ownership on the Flathead until 1908, the land was all riparian. Further it could not have been the intent of Congress to provide a *"just and equal distribution"* among riparian owners and to allow non-riparian owners to go without, particularly in view of the fact that Congress said *"just* and *equal* distribution", which must necessarily comprehend *all* the Indians living on the reservation. The whole theory of prior appropriation is contrary to the theory of just and equal distribution and is therefore contrary to Section 7 of the General Allottment Act.

3. The idea of a prior appropriation on an Indian reservation is repugnant to any theory of equitable treatment of the Indians.

We believe that the court should lean away from any construction of the acts of Congress which could possibly lead to a right of prior appropriation on an In-

dian reservation. It is to be presumed that the United States intended to treat the Indians equally, insofar as possible. The Indians are a nomadic, not an agricultural people. At the time of the creation of the reservation few, if any, of the Indians could have known of irrigation and most probably none were interested in it.

If the United States adopted the rule of prior appropriation for the Flathead Indian Reservation, then the intent of the United States was to:

1. Prefer those Indians who through their white blood, association with whites or superior intelligence were smart enough to get lands and put water on them to the exclusion of their less advanced fellows and,
2. Allow those Indians fortunate enough to locate on or near a stream to acquire rights to the exclusion of those having irrigable lands a few miles from a water source.

As a trustee for all, it was the obligation of the United States to see that an Indian acquired no more of the common property than another. If the United States permitted private appropriation by an Indian as against another, then it was guilty of a gross injustice to the less advanced Indian and to the Indian who lived away from the water and could not possibly for economic reasons build the necessary ditches to convey the water. The United States did not intend to throw these untutored and uncivilized people into competition with each other for valuable water rights and every presumption should avail against any language used

by Congress (we still assert there is none) which would tend to permit the doctrine of prior appropriation. All of this is particularly obvious when it is considered that the Acts here referred to contemplated that Indian allottees might receive fee patents and dispose of their lands to white purchasers. Inevitably these purchasers would acquire the lands first irrigated, with the result that white purchasers would soon have all the water and the neighboring Indian owners would have none. Is it not significant here that three of the four private water rights claimed are in white ownership?

II. THERE IS NO RIGHT IN PLAINTIFF OR APPELLEE DEFENDANTS TO TAKE ANY WATER FROM THE STREAMS ON THE RESERVATION EXCEPT AS SUCH PARTIES ARE ENTITLED TO WATER FROM THE FLATHEAD IRRIGATION PROJECT.

Assignment of Error No. III (R. 358)—The Court erred in holding in effect that the plaintiff, Agnes McIntire, and the defendants, The United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

Assignment of Error No. IX (R. 360)—The Court erred in holding that the maintenance of a dam in Mud Creek by the defendants, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are

deprived of the use of the waters of Mud Creek, is unlawful.

If the respondents are entitled to an amount of water equal in time and amount to each other Indian allottee or his successor under the doctrine of the case of United States v. Powers (16 Fed. Supp. 115, affirmed 94 Fed. 2d. 783), then perhaps the lower court was correct in determing that the parties were tenants in common of the water and in enjoining the United States from interfering with a flow to the respondents' lands. That is, even though the court find that the doctrine of appropriation did not apply, still it may have correctly enjoined the United States from interfering with what water respondents were entitled to under the Powers case.

It is our purpose to demonstrate that the Powers case should not apply to the Flathead Reservation.

A. THE RECORD SHOWS THAT THE APPELLEES COULD GET WATER FROM THE PROJECT SYSTEM.

There is no claim made that the respondents here have been prevented from taking water from the project system or that upon payment therefore they could not get water from the system. The record shows that they could get the water within a very short time. (R. 262-263) The question of what the rights of the parties would be if the system were not able to deliver water does not arise. The only question is, can respondents who are able to secure water from the system

take any water apart from the system? We contend that they can not.

B. THE UNITED STATES, WHICH SUSTAINED TO THE INDIANS THE GUARDIAN AND WARD RELATIONSHIP, HAD PLENARY POWER TO PROVIDE FOR THE DISTRIBUTION OF THE WATERS OF THE RESERVATION SO AS TO PROVIDE THE GREATEST GOOD FOR THE GREATEST NUMBER, AND THE METHOD DESIGNATED BY THE UNITED STATES IS THE EXCLUSIVE METHOD.

As we have seen, the United States had title to all the lands and waters as trustee for the Indians. As such trustee the United States had plenary power to provide a method of distributing the waters of the reservation *(at least prior to the time that vested rights in severalty accrued to the Indians.)*

We are not here concerned with the question of what the United States could do with these communal lands as against the Indians, although it might be contended that the government could convey to third persons.

Beecher v. Weatherby, (95 U. S. 517, 24 L. Ed. 440) We are concerned with what the United States could do with these lands in regulating the rights of the Indians *inter sese.* As to the latter the United States had an absolute power to determine the method in which the communal lands were to be handled for the benefit of the tribe.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. E.

299, 23 S. C. 216) the United States was held to have power to sell surplus unalloted lands for the benefit of the tribe contrary to the provisions of a treaty providing that the lands should not be sold without the consent of a certain proportion of the Indians.

The court, in Cherokee Nation v. Hitchcock, (187 U. S. 294 47 L. Ed. 183, 23 S. C. 115)) in addition to the language quoted on page 21 of this brief, said:

> "The decision in Stephens v. Cherokee Nation, 174 U. S. 445, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed."

Certainly the power exercised by the United States in the above case, the exercise of which was sustained by the court, was a plenary power.

In Stephens v. Cherokee Nation, (174 U. S. 445 43 L. Ed. 1041, 19 S. C. 722) the Supreme Court held that the United States had power to determine the membership of a tribe for the purpose of adjusting rights in communal property. Certainly if the United States has power to determine which of the members of a tribe are entitled to share in communal property, it has suf-

ficient power to determine how the communal waters shall be applied to the tribal lands.

In Gritts v. Fisher, (224 U. S. 640, 56 L. Ed. 928, 32 S. C. 580) the Supreme Court sustained an Act of Congress allowing children of the Cherokee tribe to share in the communal property even though a prior act had indicated that such children were not eligible.

> "But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' Cherokee Intermarriage Cases, 203 U. S. 76, 93. *It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.*"

The Supreme Court here held that the United States might diminish, by allowing additional persons to share, the interest of Indians in tribal property and funds. If the United States has power to actually decrease the individual rights to tribal property it cannot be doubted that it may regulate the use of tribal waters and provide a method for the distribution thereof.

The doctrine has been approved and followed.

Tiger v. Western Investment Co., (221 U. S. 286 55 L. Ed. 738, 31 S. C. 578).

Williams v. Johnson, (239 U. S. 414, 60 L. Ed. 358, 36 S. C. 150).

Consequently we say that prior to October 3, 1908, the time when trust patents created some rights in severalty, the power of the United States was full and complete. The question therefore is not, What power did the United States, but *how did it exercise that power?*

C. THE UNITED STATES HAS INDICATED THAT RIGHT TO WATER BE OBTAINED ONLY THROUGH THE PROJECT SYSTEM.

In the Act of Congress of February 8, 1887 (26 Stat. 794, 25 U.S.C.A. 331), Congress indicated that it would provide irrigation projects for Indian lands.

> "And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land***"

The language quoted shows that the amount of an individual allotment was to be governed by the consideration of whether the land was irrigable.

In 1904 Congress by the Allotment Act for the Flathead tribe (33 Stat. L. 302) indicated that communal funds should be used to build an irrigation system. Pursuant to this act the Indian office asked the Bureau of Reclamation to make the preliminary surveys. (See this brief p. ..... and R. 252 and 255). Stockton's party made the first survey in 1907 and included the waters of Mud Creek in their plans. (R. 252 and 253). Then on May 29, 1908, by an Act amending the Act of 1904 (35 Stat. L. 488), Congress definitely said that the lands on the reservation should be subject to the system provided. This law is so important that we will at the risk of repetition set it out again:

> "The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. *All lands allotted to Indians* shall bear their pro rata share of the cost of the operation and maintenance of the *system under which they lie.*" *(Italics supplied)*

The words "the land irrigable under the systems*** alloted to the Indians in severalty *** shall have a right to so much water *** without cost to the Indians for the construction of such *** systems," shows that Congress intended water rights to be acquired *through* the system. The contention is further strengthened

by the provision that "all lands allotted to Indians shall bear their pro rata share of the cost,etc." The act does not say part of the lands, does not say such lands as are not susceptible to private irrigation, it says *all lands*. The further language "may withhold from *any* Indian a sufficient amount of his pro rata share to pay all charge against land held in trust for him, etc." points to the congressional intention that all should profit by and all bear the expense of the operation and maintenance of the system. If Congress intended that all land should pay for the operation and maintenance of the system it intended that all land should be benefited by the system. Since the Act of 1908 Congress has spent some seven and a half million dollars on this system.

Let us point out again that apart from the acts giving rights under the system, there is no act giving rights. Congress in Section 7 of the General Allotment Act said that the Secretary should make rules to provide for the equal distribution of the water, but it likewise indicated that it was not within the province of the individual to create for himself any rights.

It was not necessary that Congress appropriate this water. The title was in the United States so long as the land remained in communal ownership. Since Congress did indicate the method of distribution of the water and did not in any way provide that there should be any other method, it follows that the method provided by the United States is exclusive. Title was in the United States and before any person can successfully

assert any individual title he must point out the statute under which the United States consented that that title might originate.

United States v. Rio Grande Irrigation Company (174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136).

D. THIS DID NOT DISTURB ANY VESTED RIGHTS BECAUSE THE LANDS WERE MADE SUBJECT TO THE SYSTEM BEFORE ANY PRIVATE RIGHTS ATTACHED TO THE LANDS.

Congress did not impair any vested water rights by the Act of May 29, 1908 (35 Stat. L. 448) above set out. We have argued at length that the United States had plenary power over the communal property prior to the vesting of private rights and since that power was exercised on May 29, 1908, which was about six months prior to the issuance of the trust patents which issued not earlier than October 8, 1908 (R. 333), no vested rights were involved.

We do not quarrel with the rule stated in U. S. vs. Powers, 16 Fed. Supp. 155, at page 162 as follows:

> "In Morrow v. U. S., 243 F. 854, 856, the Circuit Court held: 'There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter.' "

The point is that the United States exercised its power over these waters before any private rights vested. Nor do we quarrel with the rule that a conveyance of lands with appurtenances conveys the water rights used to irrigate the lands (U. S. v. Powers, 16

Fed. Supp. 155 at 162), but we do say that a conveyance of land with appurtenances conveys only such rights as were appurtenant at the time of the conveyance. Hence the question here is not, does the word "appurtenance" pass the water rights, but rather, what waters were appurtenant?

Since at the time Michel Pablo took his trust patent the United States had already limited his right to use waters to a use through the system, the word "appurtenance" passed only such limited right and the United States in now asserting that the successors of Michel Pablo take their water through the system *is not attempting to alter any rights that Pablo ever had* but is simply insisting that his successors be content with the rights which Pablo had.

E. THE SYSTEM PROVIDED IS THE MOST EQUITABLE WHICH COULD BE DEVISED.

The insistance of the United States that water be taken only through the system is in furtherance of the policy that the Indians should be treated alike. In the decisions upon this subject the sympathy of the courts for the Indian is quite evident. That is particularly true of the decisions of Judge Bourquin in the Moody litigation. (Scheer v. Moody, 48 Fed. (2) 327). Whatever we may think of the treatment accorded the Indian in days past, we correct no injustice by establishing a rule of law which creates inequality among the Indians themselves.

The Flathead reservation is arid and big. Streams

course through it at various points. Of the many thousand acres on the reservation very few acres are riparian to the streams, or near enough to make private ditches economically feasible for individual owners of allotments.

Some irrigable lands on the reservation may be irrigated by 100 yards of ditch; other require five miles of ditch. Congress never did say "Lone Wolf, by a fortunate change you got land within 100 yards of water, you take the water, but Black Eagle, the gods did not favor you, your land is five miles from water and if you want it you pay for the operation and maintenance of the ditch that takes it there, without help from the lucky Lone Wolf." Congress said, "You will all take your water from the system and you will all pay your pro rata share." Congress tried to create an equitable system and we believe that the courts should engage in every legitimate presumption to make that system effective. In the absence of a clear congressional intent the courts should not say that rights come into existence which result in a gross inequality.

It is perhaps immaterial that an irrigation project is the only method whereby an equitable distribution of water can be effected. If the court decides that each allottee or successor is entitled to a share of water without regard to the system, and if each allottee starts to take his water, all of the water masters in Western Montana cannot secure a just distribution. The amount of water to which McIntire on Mud Creek is entitled depends on the amount of water not only in Mud Creek

but in every creek in the whole Mission Valley. Only through a central system which collects and distributes all the water can the needs of the land (some 80,000 acres, R. 327) and the available water supply be determined. This factor should be of some weight in determining whether Congress did or did not intend that all Indians should take through the system.

We again call to the court's attention the fact that we are not here concerned with

1. The rights of those for whom the system is not available, or

2. The amount or propriety of various charges for the use of water.

The sole question is, do these parties have rights apart from the system? We humbly submit that they do not.

CONCLUSION

The questions here involved are of major importance to thousands of individuals owning lands on Indian reservations. They involve to some extent the value of irrigation projects costing many millions of dollars. We humbly ask that the whole matter of water rights as between the allottees represented by the systems and those fortunate enough to be located near stream be examined, and that if in the light of fundamentals the dectum U. S. v. Powers, 94 Fed. 2d 783 be found

to be erroneous, that it be withdrawn or in any event be not applied to this litigation.

Respectfully submitted,

Walter L. Pope,
Russell E. Smith,
Allan K. Smith,
Attorneys for Appellant
Flathead Irrigation District.